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No. 04-1581

IN THE

# Supreme Court of the United States

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WISCONSIN RIGHT TO LIFE, INC.,
*Appellant,*

v.

FEDERAL ELECTION COMMISSION,
*Appellee.*

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**On Appeal from the United States District Court for the District of Columbia**

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## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 53 national and international labor organizations with a total membership of 9 million working men and women, files this brief *amicus curiae* in support of Appellant with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

## INTEREST OF *AMICUS*

As a plaintiff in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (No. 02-1755), the AFL-CIO brought a facial challenge, under the First Amendment to the United States Constitution, to § 203 of the Bipartisan Campaign Reform Act ("BCRA") of 2002, 2 U.S.C. § 441b(b)(2) and (c) (amending the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*), which proscribes union and corporate funding of "electioneering communications."[2] The AFL-CIO did so because this provision

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[2] BCRA § 201(a), 2 U.S.C. § 434(f)(3)(A)(i), contains what is generally termed the "primary definition" of this term, and 2 U.S.C. § 434(f)(3)(A)(ii) contains a "back-up definition" that would apply instead if the primary definition were held to be unconstitutional. The primary definition includes a transmission element ("any broadcast, cable or satellite communication"); a content element ("refers to a clearly identified candidate for Federal office"); a temporal element (within 60 days before "a general, special or runoff election," or within 30 days before "a primary or preference election" or nominating "convention or caucus" "for the office sought by the candidate") and an audience element ("can be received by 50,000 or more persons" in the relevant electoral jurisdiction). *See McConnell*, 540 U.S. at 189-90. The term "clearly identified" means the candidate's "name," "photograph" or "drawing," and where "the identity of the candidate is apparent by unambiguous reference" otherwise. See 2 U.S.C. § 431(18). As elaborated by a Federal Election Commission ("FEC") regulation, "the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent'", or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'" See 11 C.F.R. § 100.29. A person becomes a "candidate" under FECA upon receiving contributions or making expenditures in excess of $5,000, *see* 2 U.S.C. § 431(2)(A), a threshold routinely met by incumbent Members of Congress almost immediately after winning their most recent election. *See also* 11 C.F.R. § 100.3. As a practical matter, only a Member of Congress who has announced retirement or lost a nomination contest is not a "candidate" at all times, including those periods to which § 203 applies.

threatened to impair the organization's use of the broadcast medium as a legislative and policy advocacy tool. The AFL-CIO placed in the record of that case compact discs and videotapes of television and radio advertisements it had sponsored in every year since 1995. See No. 02-1755, Brief of AFL-CIO Appellants/Cross-Appellees at 1-7 and Declara tion of Denise Mitchell, Exhs. 1-22. The Court rejected that challenge, however, and, without specifically addressing the AFL-CIO's submission, found that the various plaintiffs had not "carried their heavy burden of proving that [§ 203] is overbroad." *See* 540 U.S. at 203-11. In rejecting the right to challenge § 203 as applied to specific radio and television ads, the decision of the three-judge court in this case marks a further incursion into the right of the AFL-CIO, its affiliates and their members to engage in legislative and policy advocacy in support of workers and their families.

## SUMMARY OF ARGUMENT

1. A holding that under no circumstances may BCRA § 203, which proscribes union and corporate funding of election- proximate broadcast "electioneering communications," be subject to an as-applied challenge would unwarrantedly conflict with the Court's longstanding First Amendment jurisprudence. An as-applied challenge has always been the recognized remedy against a statute that is not unconstitutionally overbroad but ought not apply to particular circumstances.

The FEC argued that such as-applied challenges were available when it successfully defended § 203 against the facial overbreadth challenge brought in *McConnell*. The FEC's contentions now that *McConnell* precluded such challenges, and was right to do so, are incorrect. Article III limits courts to resolving only the cases before them. The Court in *McConnell* recognized that § 203, while not fatally overbroad, encompassed some "genuine issue advocacy," and it specifically noted the availability of as-applied challenges to

other BCRA provisions that it also upheld against similar facial challenges. None of the passages in *McConnell* upon which the FEC relies supports a conclusion that the Court foreclosed as-applied challenges to § 203.

The "genuine issue ads" that might be subject to such challenges comprise core First Amendment speech, implicating both the right to petition the government and speech on matters of public concern. For example, the broadcast references that trigger § 203 include any discussion of most Members of Congress, and often of the President and the Vice President, regardless of any actual electoral considerations. The Government's preference for a "bright-line" rule provides no compelling state interest in infringing First Amendment rights, and Congress itself authorized the FEC to issue regulations creating exemptions to § 203 that did not follow bright-line rules.

Nor can Congress require unions and corporations to finance genuine issue ads with FEC-regulated separate segregated funds comprised of individual voluntary contributions. *McConnell* nowhere suggested that such a requirement would be constitutional, and forcing a non-electoral entity like a union to employ an electoral entity to convey a non-electoral message violates the First Amendment because, under FECA, doing so requires declarations of political status and electoral intent. The separate segregated fund requirement is also unduly burdensome for this speech, particularly for unions and other groups that use hierarchical affiliate structures subject to FECA's affiliation rules.

2. Section 203 is constitutional only insofar as it regulates "the functional equivalent of express advocacy." Under *McConnell*, this includes messages that do not merely pertain to candidacy or an election, but that also seek to persuade voters to make particular voting decisions about referenced candidates.

An appropriate standard for defining a "genuine issue ad" not regulable by § 203 is that, first, the broadcast either (a) does not refer to candidacy, a political party or an election, or (b) refers either to candidacy, an election or both, but does not do so in a manner so as to cause the viewer or listener to make a particular voting decision with respect to the referenced candidate; and, second, the broadcast has a substantial legislative or other non-electoral purpose. This standard adequately protects First Amendment speech and affords the scope Congress intended for § 203. If ads that should be regulated by § 203 satisfy this standard, the FEC can seek instead to enforce BCRA's "back-up definition" of "electioneering communication," which applies if the primary definition is invalidated.

The three ads in the case at bar are "genuine issue ads" under this proposed standard, and in deciding this case the Court should not conclusively determine that particular aspects of them must be present or absent in order to find "genuine issue ad" status.

3. *McConnell* did not distinguish among most § 203-regulated groups in upholding § 203 against the facial overbreadth challenge. Even if the Court concludes in this case that appellant Wisconsin Right to Life, Inc. ("WRTL") has special characteristics that merit protection, it should not foreclose the possibility that unions and other entities could pursue as-applied challenges. *McConnell* did not disturb the Court's longstanding First Amendment jurisprudence that the identity of the speaker on public matters does not affect the inherent worth of its speech. And, the Court has long recognized that labor organizations play a vital role as public advocates for legislation and policies that benefit their members and all workers, and they have a strong interest in broadcasting genuine issue ads in furtherance of those goals.

## ARGUMENT

### I. Section 203 Must Be Subject to As-Applied Challenges to Protect Speech That Is Not the "Functional Equivalent" of Express Advocacy

1. A holding in this case that under no circumstances may § 203 be subject to an as-applied challenge would mark a significant and unwarranted departure from the Court's First Amendment jurisprudence. The Court has long and consistently considered that the necessary corollary of a holding that a statute is *not* facially overbroad is that circumstances not then before the Court might arise where the statute's specific application *would* be unconstitutional and so that application may be challenged in an appropriate case. The invalidation "criterion" of "substantial overbreadth" guards against striking down an entire statute that "covers a whole range of easily identifiable and constitutionally proscribable . . . conduct" merely because there is "some possibly impermissible application"; *"[i]n such a case*, the Court has required a litigant to demonstrate that the statute 'as applied' to him is unconstitutional." *Secretary of State of Md. v. Joseph H. Munson Co*, 467 U.S. 947, 964-65 (1984) (interior quotation marks omitted) (emphasis added). *See also City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 784 (2004); *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 834 (2000); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998).

Notably, the possibility of an as-applied challenge is explicitly acknowledged in each of the two decisions upon which the Court relied in *McConnell*, 540 U.S. at 207, in rejecting plaintiffs' overbreadth claims concerning § 203. *See Virginia v. Hicks*, 539 U.S. 113, 124 (2003); *Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973). And, the Court has recognized and resolved on their merits as-applied challenges to campaign finance regulation similar to that at issue here.

*See Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003) (upholding application to non-profit advocacy corporation of FECA corporate contribution limits previously upheld against a facial challenge in *Buckley v. Valeo*, 424 U.S. 1, 23-35 (1976)); *Colorado Federal Republican Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (invalidating application to political party independent expenditures of FECA provision limiting party expenditures in connection with candidates); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238 (1986) (upholding non-profit advocacy corporation's as-applied challenge to FECA's ban on corporate independent express-advocacy expenditures); *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982) (upholding minor political party's challenge to state's disclosure requirements concerning contributors and recipients of disbursements). *See also Buckley*, 424 U.S. at 74 (recognizing possibility of as-applied challenges to FECA disclosure requirements by minor political parties). *Cf. McConnell*, 540 U.S. at 211 (imposing "reasonable limiting construction" that § 203 does not apply to *MCFL* corporations despite the absence of an exception on its face, "presum[ing]" congressional awareness of *MCFL* in enacting BCRA, and noting the FEC's explicit concession to the Court that § 203 could not so apply). We have not located any instance where this Court has upheld a statute against a facial overbreadth claim and, either in doing so or in a subsequent decision, foreclosed the possibility of an as-applied challenge to that statute in every possible case.

2. In defending § 203 from the facial challenge brought in *McConnell*, the FEC relied upon the availability of as-applied challenges to that provision as reasons why plaintiffs' facial overbreadth claims against it should fail. See Brief for the Federal Election Commission, *et al.* at 78, 105-06, *McConnell v. FEC*, 540 U.S. 93 (Nos. 02-1674, *et al.*); Brief of Defendants at 64, 161, *McConnell v. FEC*, 251 F. Supp. 2d

176 (D.D.C. 2003).[3] The FEC now contends, however, that the *McConnell* decision bars these as-applied claims and that it was right to do so. See Motion to Dismiss or Affirm at 10-14 (July 2005). But the FEC's reading of that decision in this regard is not dictated by its text, especially when considered against the backdrop of the Court's First Amendment jurisprudence described above.

First, the FEC's reading of *McConnell* flies in the face of Article III's mandate that courts, including this one, should decide only the cases before them and not hypothetical disputes that may arise in the future. As the Court stated in *McConnell*, "[w]e have long rigidly adhered to the tenet never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . for the nature of judicial review constrains us to consider the case that is actually before us . . . ." *Id.* at 192 (interior quotation marks and citations omitted). Thus, with respect to § 203's prohibition of union and corporate disbursements for "electioneering communications," the Court in *McConnell* dealt only with facial overbreadth and underinclusiveness challenges that, had either succeeded, would have invalidated § 203's application to all regulated entities in all circumstances. *Id.* at 203-09. The Court did *not* rule that § 203 is constitutional with respect to every case that ultimately might come before it. Indeed, the FEC's reading of *McConnell* would bar as-applied challenges to § 203 not only in pre-enforcement cases such as this one, but such challenges raised as defenses in civil and criminal enforcement cases as well. This is an extraordinary notion of how the Court traditionally operates, let alone of the judicial function itself.

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[3] The congressional sponsors of BCRA, who intervened in *McConnell* as co-defendants of the FEC, made the same argument. See Brief for Intervenor-Defendants Senator John McCain, *et al.* at 64, 74-75, *McConnell*, 540 U.S. 93 (Nos. 02-1674, *et al.*)

Second, the Court in *McConnell* plainly recognized that § 203 reaches some broadcast ads that are entitled to First Amendment protection without in any way suggesting that such violations are beyond the authority of the courts to remedy. Thus, the Court explicitly stated that the constitutionally sufficient justifications for § 203 applied only "*to the extent that* the issue ads broadcast during the [pre-election] periods . . . are the functional equivalent of express advocacy," that is, "*if* the ads are intended to influence the voters' decisions and have that effect"; "the *vast majority* of ads" reflected in the record "clearly had such a purpose"; and, in contrast, § 203's application to "pure issue ads" was not "substantial." *See id.* at 206, 207 (emphasis added). Indeed, while the Court noted the "dispute" among the parties and within the three-judge court as to "the precise percentage" of election-proximate ads in the record that were "genuine issue ads," *id.* at 206, every party and district judge in *McConnell* acknowledged that *some* ads run during the § 203 blackout periods *were* "genuine issue ads." The Court's own conclusion to the same effect counsels strongly against a reading that an as-applied challenge could never be brought.

Third, the Court in *McConnell* noted the availability of as-applied challenges to other BCRA provisions that it upheld against similar First Amendment-based facial attacks. For example, the Court invoked § 203's "stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey messages of support or opposition," *id.* at 239 (emphases in original), in upholding BCRA's similarly inclusive requirement at § 504, 47 U.S.C. § 315(e), that broadcasters maintain records of *all* "election message requests""[g]iven the nature of *many* of the messages," *id.* (emphasis added), while observing that those "adversely affected" by § 504 "remain free . . . to challenge the constitutionality of § 504 as applied." *Id.* at 244. *See also id.* at 198-99 (rejecting plaintiffs' facial challenge to BCRA's requirement, at 2 U.S.C. § 434(f)(2)(A), (B) and (D), that

lawful disbursers make disclosures of electioneering communications and noting that this "does not foreclose possible future challenges to particular applications of that requirement").

The district court cited these and other references in *McConnell* to the availability of as-applied challenges to BCRA provisions other than § 203 as indications that the Court intended to permit no such challenge to any application of § 203. See Memorandum Opinion and Order at 4-6, No. 04-1260 (D.D.C. Aug. 17, 2004). But that analysis treats this Court's decision as if it were subject to a strict canon of statutory construction. In fact, the Court has never suggested that in ruling against a facial overbreadth challenge it must specifically state that later as-applied challenges are available in order to make them so. *See, e.g., United States v. American Library Association*, 539 U.S. 194 (2003) (no mention of later as-applied challenge option); *id.* at 215 (Kennedy, J., concurring) (mentioning option). There is in fact no reason to distinguish § 203 from these other BCRA provisions for which as-applied challenges were recognized, and the FEC has suggested none.

The FEC, however, cites two specific passages in *McConnell* as holding that as-applied challenges are unavailable. See Motion to Dismiss or Affirm at 11-12. First, the FEC points out, the Court stated that it declined to reach the merits of plaintiffs' challenge to BCRA's "back-up" definition of "electioneering communication" because the Court "upheld all applications of the primary definition . . . ." 540 U.S. at 190 n. 73. But this passage appears in a footnote to the Court's quotation of the primary definition itself, and nearby text introduces the Court's subsequent analysis as dealing with "[p]laintiffs[']' challenge [to] the constitutionality of the new term *as it applies* in both the disclosure and expenditure contexts." *Id.* at 190 (emphasis added). The Court then did uphold "all" such "applications," again, however, explicitly

subject to as-applied challenges with respect to its disclosure aspects, and implicitly subject to them with respect to its disbursement aspects.

Second, the FEC relies upon the following oblique passage addressing the *extent* to which § 203 may reach ads that are protected by the First Amendment:

> Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.[88]
>
> We are therefore not persuaded that plaintiffs have carried their heavy burden of proving that amended FECA § 316 (b)(2) is overbroad. See *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).
>
> [88] As JUSTICE KENNEDY emphasizes in his dissent, *post*, at 326-328, we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads . . . .

*McConnell*, 540 U.S. at 206-07. But this passage does *not* say that as-applied challenges are precluded; rather, the options it mentions are among the factors the Court relied upon to reach its conclusion that § 203 is not unconstitutionally overbroad. In contrast, the availability of an as-applied challenge is not relevant to the issue of whether or not a statute *is* overbroad; rather, as noted above, its availability is the constitutionally required consequence of a holding that a statute is *not* overbroad. Where a statute is "not substantially overbroad"—and is, therefore, facially constitutional—"*whatever* overbreadth may exist should be *cured* through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. at 615-16 (emphasis added). *See also New York v. Ferber*, 458 U.S. 747, 774 (1982).

3. The "genuine issue ads" that unions and corporations could not finance in the absence of an as-applied challenge constitute political speech at the core of the First Amendment. The majority in *McConnell* did not elaborate about what makes ads "genuine" other than describing what does *not*—namely, "electioneering speech," *id.* at 193, that is, "the functional equivalent of express advocacy" because "intended to influence the voters' decisions and hav[ing] that effect," *id.* at 206. But the Court plainly had in mind at least "discussion of political policy or advocacy of the passage or defeat of legislation"; for, it quoted *Buckley*'s equation—for purposes of entitlement to First Amendment protection—of that speech with "'[a]dvocacy of the election or defeat of candidates for federal office'" before explaining why, nonetheless, the government has a compelling interest in regulating certain sources of the latter. *See McConnell*, 540 U.S. at 205, quoting *Buckley*, 424 U.S. at 48.

The Court has repeatedly recognized the right to petition the government as "one of the most precious of the liberties safeguarded by the Bill of Rights, . . . and . . . implied by the very idea of a government, republican in form," *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (interior quotation marks, citations and brackets omitted), and it is entitled to "a wide measure of 'breathing space' protection," *id.* at 531, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). More broadly, "speech on public issues occupies the '"highest rung of the hierarchy of First Amendment values,"' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983), quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), and *Carey v. Brown*, 447 U.S. 455, 467 (1980). "At the heart of the First Amendment's protection" is speech on '"issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period,"' *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 308 U.S. 88,

102 (1940). *See also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346-47 (1995).

It bears emphasis on this point that § 203 proscribes *all* union- and corporate-financed broadcast references to *all* Members of Congress who are also candidates, even if they are literally unopposed for reelection or, as is the case for so many of them as a consequence of congressional redistricting, the "functional equivalent" of being so. And, the proscription also applies to references to the incumbent elected leaders of the Executive Branch, the President and the Vice President, when either is a candidate for reelection or the Vice President is a candidate for the presidency.[4] As both history and contemporary circumstances make clear, the *official* conduct of the President and the Vice President is a matter of the most acute public concern irrespective of their electoral ambitions and prospects. Yet § 203 uniquely insulates them from broadcast issue speech. Indeed, during the 2003-04 election cycle, the first to which BCRA applied, it was a federal crime for union- or corporate-financed broadcast advertising to refer in any manner to President Bush during substantial periods of time and locations while he was an *unopposed* candidate in caucuses and primaries for the Republican Party nomination; that proscription continued throughout the 50 states with respect to both President Bush and Vice President Cheney during the 30-day period prior to the August 30—September 2, 2004, Republican National Convention, even though their nominations were foregone conclusions; and it then continued without pause during the 60 days remaining before the November 2 general election.[5] There is no governmental

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[4] That situation, in fact, has long been the norm, holding true for every single presidential election year since 1932; and, in only 1952 was the incumbent President or Vice President not one of the eventual major-party presidential nominees.

[5] Specifically, beginning on December 14, 2003, 30 days before the first primary or caucus, § 203 precluded broadcast references to Presi-

interest, let alone a compelling one, in barring genuine issue communications referring to the President or the Vice President during those periods.

4. Notwithstanding the protected nature of the genuine issue advertising prohibited by § 203, the FEC contends that as-applied challenges should be precluded because allowing them "would substantially undermine Congress's effort to develop an objective bright-line rule." See Motion to Dismiss or Affirm at 14. In *MCFL* the Court squarely rejected the same argument, holding that where "the rationale for restricting core political speech is simply the desire for a bright-line rule[, t]his hardly constitutes the *compelling* state interest necessary to justify *any* infringement on First Amendment freedom." 479 U.S. at 263 (first emphasis in original; second emphasis added). Bright-line rules have been accepted in areas implicating First Amendment freedoms only in order to *protect* speech from governmental interference, not to facilitate governmental enforcement of *restrictions* on speech. Thus, in *Buckley*, the Court fashioned the bright line of express advocacy in order to clarify and narrow a vague and overbroad statute that otherwise would have trammeled upon non-electoral issue speech and unduly inhibited speakers uncertain about how their speech might be perceived, 424 U.S. at 42-44; and, the Court then invalidated FECA's $1,000 limit on spending for *all* such independent express-advocacy speech, because substantively identical (in *McConnell*'s terms, "functionally equivalent") but unregulated linguistic for-

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dent Bush in a series of geographic blackouts that continuously rippled throughout the nation, blocking every broadcast outlet, wherever located, whose signal could reach 50,000 persons in an upcoming primary or caucus state, until June 8, 2004. Additional 30-day blackout periods transpired from July 18 until the August 17, 2004 Wyoming caucus, and from July 25 until the August 24 Alaska primary. This blackout became national in scope on July 31, 30 days before the Republican National Convention, and it then continued until the November 2 general election.

mulations were available, *id.* at 45-46—an analysis the *McConnell* Court reaffirmed. 540 U.S. at 190-92.

Moreover, Congress itself did not seek to maintain a "bright line" where the application of § 203 would have inappropriate consequences. Thus, the statute authorizes the FEC by regulation to exempt from its proscription "any . . . communications to ensure the appropriate implementation" of the primary definition, so long as the communication does not "promote[] or support[]" or "attack[] or oppose[]" a "clearly identified federal candidate." See 2 U.S.C. § 434(f)(3)(B)(iv), incorporating by reference 2 U.S.C. § 431(20)(A)(iii).[6] The need for a "bright-line" standard can hardly be regarded as compelling when Congress itself allowed less than bright-line exceptions to be created.

5. There is also no constitutional basis for requiring unions and corporations to finance their genuine issue advocacy by establishing, administering and funding, through solicitation of individual voluntary contributions, a separate segregated fund. First, the Court in *McConnell* stated that "[t]he ability to form and administer separate segregated funds authorized by FECA § 316, 2 U.S.C. § 441b . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in *express advocacy*," 540 U.S. at 203

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[6] While the Court upheld against a vagueness challenge this "promote," etc. language—at least as it applied to political parties, due to their inherently electoral nature—the Court did not declare that these words painted a bright line and acknowledged that it might be necessary under some circumstances "to seek advisory opinions for clarification" from the FEC. See *McConnell*, 540 U.S. at 170 n. 64. We also note that the Court did not explain its conclusion that this language provided clear (if not necessarily "bright-line") guidance, and the FEC largely eschewed exercising its exemption authority in its rulemaking on "electioneering communications" because it could not determine whether the language applied to numerous circumstances suggested to it during the notice-and-comment period. See FEC, Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200-03 (October 23, 2002).

(emphasis added), and BCRA "extend[s]" that requirement to payment for "electioneering communications," *id.* at 204, but the Court specifically refrained from suggesting that separate segregate funds comprise a constitutionally adequate alternative where "genuine issue ads" are concerned. *See id.* at 206.

Second, political committee status under FECA entails compelled declarations of political status and electoral intent with respect to "electioneering communications"[7] that directly contradict the true nature of *non*-electoral speech and undermine its persuasive appeal. Requiring a non-electoral entity like a union to employ an electoral entity as the sponsor of its non-electoral message violates the First Amendment "principle of autonomy to control one's own speech," *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995); *see generally Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197-200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. at 341-42; *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988); *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 11 (1986), and deprives the organization and its members of the "right . . . to advocate their cause" by "what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

Finally, as applied to genuine issue speech, the segregated fund requirement also entails unduly complicated and burdensome administrative and other requirements. In *MCFL* the

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[7] FECA requires a federal PAC communication to identify its federal PAC sponsorship, see 2 U.S.C. § 441d(a)(1), and further requires the PAC to file a report with the FEC that states "[t]he *elections* to which the electioneering communications pertain," 2 U.S.C. § 434(f)(2)(D) (emphasis added). This statement "shall be made under penalty of perjury," 2 U.S.C. § 434(f)(2), and the report is promptly posted on the FEC's publicly accessible website. See 2 U.S.C. § 434(a)(11)(B).

Court held that those burdens made it a "severely demanding task" for a nonprofit ideological corporation to engage in express-advocacy independent expenditures. 479 U.S. at 256. That burden is at least as severe for unions that wish to broadcast genuine issue advocacy speech that poses no greater threat of corruption or its appearance than does an *MCFL* organization itself. And, for unions and other organizations that operate in a hierarchical, affiliated structure, typically only the national affiliate sponsors and controls a federal PAC because FECA treats all affiliates of a national organization as comprising a single entity for purposes of political committee sponsorship, fundraising and spending.[8] See 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 110.3(a)(2)(ii) and (iii). Absent as-applied recourse, a typical union must either create its own PAC to fund genuine issue advocacy "electioneering communications" or try to persuade its national parent affiliate —perhaps on very short notice to deal with an immediate and unforeseen legislative problem—to spend its own precious PAC money, which it raised for contributions and express-advocacy spending, for the affiliate's issue speech—which then, for reasons just explained, would have to be publicly misattributed to that PAC. None of these burdens can be justified as serving any, let alone a compelling, governmental interest.

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[8] So, for example, there are over 30,000 labor organizations in the private sector alone, most of which are small organizations with modest treasuries, see "Record-Keeping Under the Labor Management Reporting and Disclosure Act (LMRDA): Do DOL Reporting Systems Benefit the Rank and File?", Joint Hearing Before the Subcommittee on Workforce Protections and the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, 107th Cong., 2d Sess. 115-16 (2002), but there are only 328 union-sponsored federal political committees. http://www.fec.gov/press/press2005/20050412pac/sumhistory.pdf.

## II. "Functional Equivalence" Requires That the Message Is Intended to Cause a Particular Voting Decision Concerning the Candidate Referenced in the Advertisement; Other Messages Should Be Treated As "Genuine Issue Ads" Not Regulable by Section 203

If an as-applied challenge to § 203 may be brought, the next issue is how to determine when that provision cannot be applied to a particular "electioneering communication." The test explicated in *McConnell* is that the communication must be "the functional equivalent of express advocacy," that is, an ad that is "intended to influence the voters' decisions and hav[ing] that effect." 540 U.S. at 207. Similarly, the Court stated that non-express advocacy ads are "functionally identical" to express advocacy ads if they are "used to advocate the election or defeat of a clearly identified candidate," *id.* at 126 (echoing the original *Buckley* formulation, see 424 U.S. at 80 (footnote omitted)), and "are specifically intended to affect election results . . . ." 540 U.S. at 127. And, in discussing the primary definition, the Court referred to ads that "although . . . not urg[ing] the viewer to vote for or against a candidate in so many words, . . . are no less clearly intended to influence the election," *id.* at 193 (footnote omitted), illustrating this concept with quotes from a "striking example," a 1996 Montana ad that compared a congressional candidate's alleged assault of his wife and failure to pay child support with his legislative voting record. *Id.* at 193 n. 78. The Court also attributed a "vote-for" message to ads that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *See id.* at 127 (footnote omitted).[9] In sum, then, a broadcast advertisement is the "functional equivalent of express advocacy" not merely

[9] The Court did not directly discuss either the content of other particular advertisements in the record or other specific formulations of advertisements.

because it *pertains* to candidacy or an election, but because its reference to the candidate *also* seeks to persuade a voter to make a particular voting decision with respect to that candidate.

Consistent with *McConnell*, a standard that defines "genuine issue advocacy" to which § 203 cannot constitutionally be applied should preserve the reach of § 203 insofar as the Court upheld it; accommodate the compelling First Amendment interests that require as-applied exceptions to § 203; and enable speakers, often in exigent circumstances, to proceed without having to "'hedge and trim'" their speech. *See Buckley*, 424 U.S. at 43, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945). We believe such a standard is comprised by the following test:

> *First, the broadcast either (a) does not refer to candidacy, a political party or an election, or (b) refers either to candidacy, an election or both, but does not do so in a manner so as to cause the viewer or listener to make a particular voting decision with respect to the referenced candidate; and*
>
> *Second, the broadcast has a substantial legislative or other non-electoral purpose.*

Element 1(a) ensures that an advertisement makes no partisan or electoral references by excluding mention of a candidate *qua* candidate, a political party or the election itself. Satisfaction of this element is easily determined by examination solely of the four corners of the ad itself. Alternatively, Element 1(b) would permit a speaker to refer to candidacy or an election in order to raise a particular issue in the context of the election, such as either to influence all of the candidates to address the issue in the campaign or to influence the electorate to consider the issue when they vote. But the speaker could not indicate its preferred position on the issue, suggest what position the candidates should take, or suggest what

position the voters should prefer in deciding which candidate to vote for.

Element 2 affirmatively requires that the advertisement have a clear purpose other than influencing the outcome of an upcoming election. A substantial legislative purpose both implicates core First Amendment non-electoral speech and is the most likely non-electoral purpose of an advertisement that refers to an incumbent legislator who is a candidate. The allowance of a substantial other non-electoral purpose takes into account the possibility that the reference neither pertains to a legislative matter nor has an electoral purpose. The presence of either substantial purpose would often be ascertainable solely by examining the content of the ad; otherwise it would be subject to determination by ordinary standards of proof.

The texts and circumstances of six exemplars of broadcast advertisements that would satisfy Elements 1(a) and 2 are detailed in District Judge Leon's opinion in *McConnell v. FEC*, 251 F. Supp. 2d at 488-96, as "[r]epresentative [e]xamples of [g]enuine [i]ssue [a]dvertisements" that would have been subject to § 203 had it been in effect; all are AFL-CIO ads from 1998 and 2000. Each ad discusses a current legislative issue and refers to the candidate (each an incumbent Member of Congress) only in calling on him or her to take particular action on the issue. *See id.* One of the ads, called "Deny," aired in September 1998 in 17 substantially identical versions, 13 of which referred to Senators who were not candidates in the upcoming general election, and four of which referred to Senators who were candidates. *See* No. 02-1755, Brief of AFL-CIO Appellants/Cross-Appellees at 6, *McConnell v. FEC*.

This test for recognizing genuine issue advocacy should be adequate both to protect core First Amendment speech that § 203 otherwise prohibits unions and corporations from financing, while leaving to § 203's regulation the kinds of ads

with which Congress was concerned. The Court should recognize, however, that any such problematic ads that nonetheless might slip through the proposed constitutional filter could still be subject to the FEC's enforcement authority under the back-up definition of "electioneering communication," namely:

> Any broadcast, cable or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

2 U.S.C. § 434(f)(3)(A)(ii). Congress enacted this provision in order to maintain an "electioneering communication" rule in the event that the primary definition was "held to be constitutionally insufficient by final judicial decision to support the regulation provided herein . . . ." *Id.*[10] Although Congress arguably intended that this standard apply only in the event of a *facial* invalidation of the primary definition, see 147 Cong. Rec. S2704-12 (daily ed. March 22, 2001); 147 Cong. Rec. S3119-20, S3122-23 (daily ed. March 29, 2001), the statute does not make that distinction and it is broad enough to apply whenever the primary definition has been invalidated as applied to a particular advertisement. An advertisement that contains no partisan or electoral references, has a substantial legislative or other non-electoral purpose, and does not satisfy the backup definition can safely be considered a genuine issue ad. But where the FEC could demonstrate that an ad *is* covered by the back-up definition, the fact that the primary definition did not apply would be of no

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[10] As noted earlier, because the Court in *McConnell* upheld the primary definition against plaintiffs' facial challenge, it did not reach the merits of plaintiffs' facial challenge to the back-up definition. *See* 540 U.S. at 190 n. 73.

consequence, as the ad then would be subject to § 203's requirements.

In the case at bar, appellant WRTL has identified 16 features of the three ads at issue that, it contends, demonstrate that these ads in fact "are authentic grass-roots lobbying and not electioneering . . . ." Jurisdictional Statement at 5-6. Under the proposed test, these ads plainly satisfy Elements 1(a) and (2), and the record strongly suggests that none of them would satisfy the back-up definition. However, while WRTL emphasizes many aspects of its advertisements in contending that they are not the "functional equivalent of express advocacy," the presence or absence of most of them should not be prerequisites to status as a "genuine issue ad." We urge the Court instead to articulate the essential elements of a viable standard while not requiring or foreclosing consideration of other precise factual circumstances, many of which might not now be easily foreseeable.

## III. The Court Should Not Foreclose the Possibility That Labor Organizations or Other Entities Regulated By Section 203 Could Pursue As-Applied Challenges

With the sole exception of *MCFL* corporations, *McConnell* did not distinguish among the various entities regulated by § 203 in analyzing the record of their broadcast advertising practices, and the Court upheld that provision against the facial overbreadth challenges on the basis of the nature of the speech that it covered. The current as-applied challenge is brought by appellant WRTL, which describes itself as "a nonprofit, nonstock, ideological Wisconsin corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code [that] does not qualify for any exception"—including that established by *MCFL* —"permitting it to pay for its [electioneering communications] from [its] corporate funds." Jurisdictional Statement at

5. In addressing the appellant's claims, and in consideration of the positions expressed by other *amici* in support of the appellant, even if the Court concludes that WRTL has characteristics that merit special treatment, it should not foreclose the ability of unions and other entities regulated by § 203 whose claims are not before the Court in this case to make out content-based as-applied challenges in future cases.

In addition to the Article III concerns discussed earlier, the Court's longstanding First Amendment jurisprudence rejects the proposition that particular kinds of speakers can be restricted in financing the kinds of "genuine issue ads" that such a challenge would seek to protect. Where a speaker on *non*-electoral matters of public concern is a labor union, a corporation or some other organized group, no lesser or different First Amendment protection is at stake than it would be for a different speaker, because "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. at 777. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments," including "the source and credibility of the advocate." *Id.* at 791-92 (footnotes omitted).

In *Bellotti*, the Court invalidated a criminal statute barring corporations from making contributions or expenditures in connection with ballot measures, because such advocacy "affords the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783 (footnote omitted). "The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Id.* at 790. *See also Pacific Gas & Electric Co. v. Public Utilities Comm.*, 475 U.S. at 8-9 (state cannot require corporation to include statements of citizens group in its newsletter to customers); *Consolidated Edison*

*Co. v. Public Service Comm.*, 447 U.S. 530 (1980) (state cannot preclude corporation from including with customer bills its own newsletter that discusses public policy matters). *Cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 297 (1981) (state cannot limit contributions, by any source, to ballot measure committee). In *McConnell* the Court said nothing to place this jurisprudence in question.

Indeed, the interest of a particular group in broadcasting a genuine issue ad, even close to an election, is as strong and vital as the interest of the public in receiving that message. For example, whatever interest the government may have in restricting express advocacy or its pre-election "functional equivalent" when it is broadcast and paid for by the AFL-CIO or a labor union, the Court has long recognized and afforded protection to the vital role of labor organizations in the *non*-electoral public arena as advocates for legislation and public policies in the interests of both their members and all workers. *See generally Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991); *Ellis v. Bhd. of Railway and Airline Clerks*, 466 U.S. 435, 446 (1984); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 227-32 (1977); *Pipefitters v. United States*, 407 U.S. 385, 402-32 (1972); *Machinists v. Street*, 367 U.S. 740, 767 (1961); *id.* at 798, 800-03, 812-16 (Frankfurter, J., dissenting)[11]; *United States v. United Automobile Workers*, 352

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[11] Of the AFL-CIO itself and its predecessor, the AFL, Justice Frankfurter wrote over 40 years ago:

> American labor's initial role in shaping legislation dates back 130 years. With the coming of the AFL in 1886, labor on a national scale was committed not to act as a class party but to maintain a program of political action in furtherance of its industrial standards . . . When one runs down the detailed list of national and international problems on which the AFL-CIO speaks. . . .[t]he notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages,

U.S. 567, 578-86 (1957); *United States v. CIO*, 335 U.S. 106, 115-21 (1948); *id.* at 143-46 (Rutledge, J., concurring).[12] The case at bar provides no occasion to foreclose the ability of labor organizations to vindicate that role through an as-applied challenge to § 203.

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> hours, and conditions of employment. And this Court accepts briefs as *amici* from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to and insulated from economic interests. It is not true for industry or finance. Nor is it true for labor.

*Machinists v. Street*, 367 U.S. at 812, 814-15 (Frankfurter, J., dissenting) (footnotes omitted).

[12] Unions are voluntary associations that employees may join and quit at will. *Pattern Makers League v. NLRB*, 473 U.S. 95, 104-07 (1985). Moreover, as the Court has observed, unions have "crucial differences" from corporations: although unions too "may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure," and "the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66 (1990). As *Austin* summarized, *id.* at 665, a union that is the exclusive bargaining representative for a unit of workers may not compel a represented non-member to support, with dues or other fees, the union's political, legislative and ideological expenditures deemed non-directly germane to collective bargaining and contract administration. *See generally Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Abood v. Detroit Bd. of Education, supra; Machinists v. Street, supra.* The same analysis applies, of course, to support the conclusion that a union is far more likely than a corporation to reflect its members' views in the union's *non*-electoral legislative and other policy advocacy.

## CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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